EMPLOYMENT TRIBUNALS

Claimant: Mr M Yaqub

Respondent: Sunmagic Juices Ltd

Heard at: Manchester (by CVP) **On:** 25 and 26 April 2022

Before: Tribunal Judge Callan

REPRESENTATION:

Claimant: Mr. M. Iqbal (friend)
Respondent: Mr. S. Jagpal (consultant)

JUDGMENT ON LIABILITY

The judgment having been sent to the parties on 29 April 2022 and reasons having been requested by the claimant, the following reasons are provided:

WRITTEN REASONS

Introduction

1. The claimant was a Laboratory Technician employed by the respondent at its Nelson site prior to his dismissal by reason of redundancy on 01/10/2020.

2. By a claim form presented on 21/02/2021, the claimant complained that he had been unfairly dismissed.

3. The respondent resisted the claim in its response form and maintained the dismissal was by reason of a reorganisation resulting in a redundancy situation arising or alternatively, the dismissal was for some other substantial reason. The respondent asserted that consultation, selection and alternative employment had been properly considered, and the dismissal was fair in all the circumstances of the case.

Issues

4. The issues to be determined were agreed at a Preliminary Hearing held on 26/05/2021 and confirmed at the outset of this hearing:

4.1 Was redundancy the reason or principal reason for the dismissal?

4.2 Did the respondent act reasonably in all the circumstances of the case in treating redundancy as a sufficient reason for dismissal?

4.3 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason for dismissing the claimant, that is, was dismissal within the range of reasonable responses? In particular:

4.3.1 was the claimant adequately warned and consulted?

4.3.2 was a reasonable selection for redundancy adopted including the respondent's approach to the selection pool?

4.3.3 were reasonable steps taken to find the claimant alternative employment?

Evidence

5. I heard evidence from Ms Hannah Johnson, HR Administrator, Mr. Mark Tuddenham, Production Manager and Mr. Tim Collins, Operations Director on behalf of the respondent. The claimant gave evidence on his own behalf. I was also provided with a bundle of 314 pages, and I read those documents referred to by the witnesses in addition to the pleadings and case management summary of the Preliminary Hearing held on 26/05/2021.

Relevant Legal Framework

6. Section 98(1) and (2) of the Employment Rights Act 1996 (ERA) provides as follows:

"(1) In determining for the purposes of this Part whether the dismissal is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) …

(b) …

(c) is that the employee was redundant."

7. Section 98(4) of ERA provides as follows:

"Where the employer has fulfilled the requirement of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

8. Section 139 of ERA states that:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) the fact that his employer has ceased or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason."

9. Where the respondent has shown a potentially fair reason, the tribunal must then consider the test in section 98(4) ERA set out above. In assessing reasonableness, the tribunal had regard to the guidance in **Williams v Compair Maxam Ltd.** [1982] ICR 156 in respect of the question whether the dismissal lay within the range of reasonable responses which a reasonable employer could have adopted. Those factors are:

(a) whether employees were warned and consulted about the redundancies;

(b) whether the pool for selection adopted was reasonable;

(c) whether the criteria used in selecting employees to be made redundant did not, so far as possible, depend solely upon the opinion of the person making the selection but could be objectively checked against such things as attendance record, efficiency at the job, experience or length of service;

(d) whether the selection was made fairly in accordance with the criteria and any representations made by or on behalf of the employee were considered; and

(e) whether any alternative work was available which could be offered to the selected employee.

The Facts

10. The respondent produces and supplies fruit juices and smoothies, and employed 65 personnel at its Nelson site in May 2020.

11. The claimant was transferred into the employment of the respondent on 01/04/2018 by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended). He had commenced employment with the transferor, Cott Beverages Ltd, in May 2007. He was employed as a Laboratory Technician throughout. The respondent employed two Laboratory Technicians at its Nelson site.

12. The claimant had biannual performance reviews in April and October 2018, as did his colleague Jane Lyell. Those were provided at pp144-155. The April 2018 review showed the claimant to be "developing" due to having an extended period of absence for personal reasons. The need to pay a lot more attention to detail was remarked upon. It was noted that he was hard working and had a good eye for quality. His colleague was also marked as developing on most of the criteria, although she was shown to meet objectives on three of them. The remarks indicated that she had been hindered in being trained on some of the routine site audits. In his October 2018 review, the claimant was still shown as developing and needed to pay more attention to detail. His colleague was shown to be still developing in two of the objectives, but mostly met them. It was noted she had a positive flexible approach. No performance reviews were undertaken in 2019.

13. The coronavirus pandemic adversely impacted upon the respondent's business resulting in an overall reduction of 36% in manufacturing demand. In response, the respondent proposed to shed 15 jobs and change its shift patterns for some staff. The respondent drew up a business case (pages 165-170) to reorganise the Nelson site which it proposed would result in the shedding of 15 jobs, including that of one of the Laboratory Technicians.

14. On 18/05/2020, the claimant was handed a letter setting out the consultation arrangements and the proposal to elect approximately 3 employee representatives. The claimant was invited to put himself forward or alternatively to nominate someone else to act as a representative. Rules for the election of employee representatives were enclosed along with a candidate nomination form. Consultation with employee representatives took place on 04/06/2020 and 11/06/2020. Individual consultation took place with the claimant on 24/06/2020 and 09/07/2020.

15. On 04/06/2020, employee representatives attended a meeting with Mark Tuddenham and Hannah Johnson. There were 5 employee representatives in attendance. The role of representatives was discussed, along with the checking of representation of groups. The business case was discussed, as was the planned scoring matrix and voluntary redundancy. It was agreed that a "multi-skilled" column would be added for all staff headed "knowledge of additional processes/machinery".

16. A further consultation meeting with representatives took place on 11/06/2020. Along with other matters discussed, the representatives were informed that the scoring would be undertaken by 3 managers, including Mark Tuddenham. Hannah Johnson would add data relating to absences and disciplinary records from personnel records she held. It was agreed that absence would not include absences related to "protected characteristics" or Covid-19. Calculation of redundancy pay, notice periods, time off for job searches and what would happen if production picked up were discussed.

17. There were undated handwritten notes relating to the scoring of the 2 Laboratory Technicians in the selection pool affecting the claimant. Six criteria were applied – additional training, knowledge of other machinery/processes, attendance, disciplinary record, standard of work and aptitude for work. They each scored the same number of points for the first 4 criteria. The panel used performance reviews to score the standard of work. It was noted that they both had a "really good standard of work" but that the other Laboratory Technician was "slightly ahead" of the claimant. The claimant scored one less point than his colleague for that criterion. With regard to aptitude, this was defined as "talent/skill/competence". Again, appraisals were used for assessing the scores for this criterion. The claimant was noted to be "developing" whereas his colleague was reported to "meet expectations" and "gets job done and done well". The claimant was reported to cover "all bases" but was not as competent as his colleague. He did "what's needed and nothing more". The panel decided to score the other Laboratory Technician two more points than the claimant. Therefore, on the matrix, the claimant scored three fewer points than his colleague.

18. The first individual consultation meeting took place on 24/06/2020 by telephone with Mark Tuddenham, Hannah Johnson and the claimant in attendance. The claimant was unrepresented but was content to continue without representation. The redundancy situation was explained to the claimant along with steps taken to mitigate the need to make compulsory redundancies. He was informed that no firm decisions had been taken to confirm his redundancy at that stage. The consultation process would be undertaken before any decision would be made. The claimant was informed that the redundancy consultation period was anticipated to end on

09/07/2020. He was given the figures which would be paid by way of notice and statutory redundancy pay should he be dismissed. The claimant raised his use of a palletiser which he had used when he started with the previous company prior to the TUPE-transfer. He was informed by Mr. Tuddenham that that machinery was not in the respondent's Nelson facility so they could not use that experience. With regard to the scoring, the claimant stated that he "was away from the business for the set up of the site because of his daughter's illness". His colleague had the chance to do more training as a result. The claimant also raised his score under aptitude and stated that he "always wanted to, and asked for, the opportunity to learn and do more." Mr. Tuddenham undertook to discuss these matters with the claimant's line manager, Mark Yates, and to bring back more information for the second consultation.

19. The claimant had a second meeting on 09/07/2020 with the same attendance as the first meeting. He was again unrepresented but content to proceed without a representative. The claimant raised that in the past, the company was at the same level of production as it was currently and yet still required two technicians. He was given the response that the orders at that time were much bigger and the respondent was having to adjust to fit current demand. The claimant raised that he didn't have the chance to qualify for audits whereas he alleged his colleague was given that opportunity. Mr. Tuddenham said that as aptitude was the willingness to do new things, they were content to add another point to his score. However, as he scored two fewer points than his colleague, he was still selected for redundancy. The outcome was confirmed by letter dated 13/07/2020 (page 195). He was given notice which expired on 01/10/2020.

20. The claimant appealed against his dismissal. His grounds of appeal were provided at pages 197-199. He challenged the scores given in the scoring exercise and alleged his fellow Laboratory Technician had been more favourably treated than he had been.

21. The appeal hearing took place on 27/07/2020. The claimant had been informed of his right to be accompanied but declined representation. The appeal was heard by Tim Collins, Operations Director and Hannah Johnson was also in attendance. Notes of the hearing were provided at pages 201-211 and each page had been signed by the claimant to confirm their accuracy. The claimant raised issues with regard to the need for redundancies, whether it was necessary to reduce the number of laboratory technicians, and the fairness of the scoring of the selection criteria. In particular he raised an allegation that his colleague had been treated more favourably in respect of work she had been doing in recent years and in training opportunities afforded to her. Mr. Collins' letter rejecting the appeal on 10/08/2020 was provided at pages 212-213.

22. On 15/09/2020, the claimant secured employment as an Interim Laboratory Technician on a 3 months fixed term contract to commence on 28/09/2020. He left that employment on 31/03/2021.

23. On 09/10/2020, Mark Yates filled in a recruitment requisition form for a Qualty Assurance Assistant (QAA) which he submitted to Hannah Johnson. Olivia Turnock

was appointed on or about 19/10/2020. Her appointment was short-lived and a further recruitment requisition form to replace her was raised on 03/03/2021. An offer of appointment was made to Edwina Gibney on 12/04/2021.

24. Hannah Johnson confirmed in evidence that her role at the scoring meeting was to take notes and to provide information from the HR files relevant to the scoring criteria. Her role at the meetings with the claimant was to take notes.

25. With regard to the QAA role, Hannah Johnson said that at a weekly management meeting on 04/10/2020, discussion took place in respect of arrangements for holidays and cover for sickness in the Quality Department. The volume of work did not support the appointment of a second Laboratory Technician so it was decided that a QAA should be recruited. The respondent had attempted to recruit a QAA before the pandemic but then had to rescind the offer due to a downturn in trade. It was decided to attempt to recruit to that role and provide some basic lab training so as to have some cover for sickness absence and holidays. Recruitment was by word of mouth and an offer was made on 19/10/2020. Ms Johnson's evidence was that the claimant was considered for the post but his notice had expired, he had received his redundancy payment and it was known that he was working for Refresco Ltd, a company which had close links with the respondent. The claimant was not approached or spoken to about the QAA post.

26. In evidence, Mark Tuddenham stated that the claimant's extended absence due to his daughter's illness did not adversely affect his scoring for training and he scored the same as the other Laboratory Technician for that criterion.

27. Mr. Collins' evidence was that he reviewed the documentation and spoke to the decision-makers to clarify the points raised by the claimant. Having done so, he upheld the original selection decision.

28. In his evidence, the claimant raised that he had scored more points than the other Laboratory Technician in a redundancy exercise undertaken in 2016. He had been judged to have met expectations in 2017. He maintained that there was always the need for two technicians and that was the case even when only one line was running. He agreed that the evidence showed that in respect of training, both of the Laboratory Technicians had been equally affected. The claimant alleged that his line manager (Mark Yates) had taken against him and relied upon emails at pages 284-310 as evidence of this. He agreed that it was possible that the other technician was a better performer than him. He contended the QAA role was one he could have done and the recruitment was deliberately held over until October 2020.

Discussion and Findings

29. The first matter I had to decide was whether the claimant's dismissal was for redundancy. Given the proposed reorganisation was anticipated to result in the respondent's need for Laboratory Technicians to diminish, I am satisfied that situation fell within the statutory definition of redundancy set out above and the reason for the claimant's dismissal was redundancy.

30. The claimant makes no real criticism of the consultation process and I find that the respondent's warning of redundancies and consultation with the claimant set out above fell within the range of reasonableness test.

31. The claimant was highly critical of the selection process, particularly the application of the selection criteria. In respect of the use of the appraisals from April and October 2018, none having been done in 2019, I find that this did not fall outside the range of reasonable responses so as to render the selection unfair. It applied to the other Laboratory Technician as much as to the claimant and the claimant was unable to show that there were particular reasons why it was unfair to him and not also to her.

32. The other criticisms raised by the claimant in respect of the selection process I also find fell within the band of reasonableness and were fair. The claimant was invited to a meeting on 24/06/2020 where the selection process was discussed with him. The second consultation meeting took place on 09/07/2020 when he discussed his scores with Mr. Tuddenham. He also had the right of appeal which he exercised in writing on 20/07/2020 and which was heard on 27/07/2020 by Mr. Collins.

33. In evidence, the claimant said that generally the other Laboratory Technician worked opposing shifts to him. I find, therefore, his direct knowledge of her work was partial, but in any event that is not the important issue. It is the application of the criteria to him which is to be evaluated. The claimant contended that he should have received a higher score because he could use a palletiser but the use of that machine was not a requirement of him which the respondent had. They could not make use of that experience.

34. The claimant relied on various difficulties he experienced at the beginning of his employment with the respondent, but the evidence showed that the other Laboratory Technician was also hindered in training such as for routine site audits. They were both equally affected. The claimant accepted in evidence that the other Laboratory Technician was possibly a better performer than him.

35. The claimant raised the volume of testing he conducted in his evidence, but he accepted that that is a matter which varied from day to day and depends on the line and "what is happening".

36. In essence, his attack on the application of the criteria to him fell short of showing the respondent acted outside the band of reasonable responses.

37. In regard to alternative employment, the claimant accepted that during the redundancy process, at least up to 13/07/2020 when notice was given, there was no alternative work available.

38. Fundamental to his case, the claimant maintained that there was always the need for two technicians, even when only 1 line was in operation. This is obviously a view the claimant holds on the basis of his 13 plus years of experience and I have no doubt he genuinely believes it to be the case. However, it is for the employer to organise its business and to make its staffing decisions accordingly. It is for the

respondent to show that the need for employees had ceased or diminished or was expected to cease or diminish. I am satisfied that it has done so (as set out above).

39. The question of alternative employment arising very soon after the expiry of the claimant's notice has been the subject of anxious consideration. If it is said that it was a ploy to avoid re-employing (or continuing to employ) the claimant, that is a very serious allegation.

40. I reject the contention that it was a cynical move on the part of the respondent. It is clear that the claimant was a good worker and this was reflected in his scores. It was noted in the assessment that the choice was between two very good Laboratory Technicians. He was well-regarded. The claimant was obviously disappointed to have been made redundant and put forward the case that Mark Yates had taken against him. The evidence does not support that contention: in reaching that decision, I have taken into account the tone of the emails at pages 284-310 which appear to be appropriate and at times congratulatory and warm.

41. I find that the contention that there was a cynical ploy to delay filling the Quality Assurance Assistant post until after the claimant's notice had expired is not made out on the evidence. I have not turned my mind as to whether it would have been suitable alternative work for the claimant in any event.

42. This decision is reached on the balance of probabilities and applying the range of reasonable responses test having considered the documentary and oral evidence heard over the course of one and a half days.

43. For these reasons I dismiss the claimant's claim of unfair dismissal.

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Tribunal Judge Callan sitting as an Employment Judge
Date: 29 June 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
22 July 2022

FOR THE TRIBUNAL OFFICE